Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF MAINE,
Petitioner

V.

DAREN L. GRAVES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHERE THE DEFENDANT HAD THE OPPORTUNITY TO CROSS-EXAMINE THE RAPE VICTIM ABOUT HER SALE TO JERRY MARTIN OF A T-SHIRT CARICATURING THE DEFENDANT AND DID NOT EXERCISE IT, DID THE MAINE SUPREME JUDICIAL COURT ERR IN INTERPRETING THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHT TO REQUIRE THAT THE DEFENSE BE ALLOWED TO PUT ON JERRY MARTIN AS AN IMPEACHMENT WITNESS ?

II. WHERE THE ISSUE OF WHETHER THE DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHT HAD BEEN VIOLATED WAS RAISED FOR THE FIRST TIME IN THE WRITTEN DECISION OF THE MAINE SUPREME JUDICIAL COURT WITHOUT ANY OPPORTUNITY FOR THE STATE TO ADDRESS THE SCOPE OF THE CONFRONTATION CLAUSE OR EVEN DEVELOP A RECORD IN THE TRIAL COURT FOCUSED SPECIFICALLY ON THIS ISSUE, SHOULD THE MAINE SUPREME JUDICIAL COURT HAVE APPLIED THE PLAIN ERROR TEST DISCUSSED IN UNITED STATES V. OLANO, 113 S.CT. 1770 (1993), INSTEAD OF THE HARMLESS

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OPINIONS BELOW

The Opinion of the Supreme Judicial Court of Maine in State of Maine v. Daren L. Graves, Decision No. 6812 (Decided March 14, 1994), granting Mr. Graves' appeal from a judgment of conviction of gross sexual assault (17-A M.R.S.A. § 253(1)(A) (Supp. 1990)) entered in the Maine Superior Court, is officially reported as State v. Graves, 638 A.2d 734 (Me. 1994), and is reproduced in Appendix A to this Petition. As the issue of whether Mr. Graves' sixth amendment confrontation right had been violated was raised for the first time in this case in the written decision of the Maine Supreme Judicial Court, there is no order of the Maine Superior Court - the trial court - relative to this sixth amendment issue.

The oral order of the Maine Superior Court excluding Jerry Martin's proposed testimony under Rule 403 of the Maine Rules of Evidence is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Daren L. Graves, Decision No. 6812 (Decided March 14, 1994), was entered on March 14, 1994, and the Court's mandate was issued on the same date. Petitioner filed a motion for reconsideration dated March 23, 1994, which was denied by order of the Maine Supreme Judicial Court (reproduced in Appendix C) on March 31, 1994. Petitioner has timely filed this petition for a writ of certiorari within the ninety-day filing period set forth in U.S. Sup. Ct. Rule 13.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him....

The Fourteenth Amendment to the Constitution of the United States:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On May 7, 1991, a Grand Jury returned an indictment charging Daren L. Graves, a police officer, with gross sexual assault as follows:

> On or about February 20, 1991, in the County of Lincoln, State of Maine, Daren L. Graves did engage in a sexual act (as defined in 17-A M.R.S.A. § 251(1)(C)(1) (Supp. 1990)) with Shani L. Orne, and the said Shani L. Orne did submit as a result of compulsion, all in violation of 17-A M.R.S.A. § 253(1)(A) (Supp. 1990).

(R. at 8).[1]

On August 18, 1992, the State filed a motion in limine to exclude from Respondent's trial, *inter alia*, the following:

> Any and all evidence of the existence of a T-shirt depicting Daren Graves. None of the State's witnesses have acknowledged any participation in the creation or marketing of such a T-shirt. Any inquiry into the creation, description, or sale of such a T-shirt would be improper evidence of bias and any probative value would be greatly outweighed by its prejudicial value and may lead to confusion of the jury.

(R. at 45).

The front of the T-shirt in question depicted Respondent in handcuffs, with a third cuff around his exposed and erect penis. The words, "AIN'T GETTIN OFF... THIS TIME," appeared beside the

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[1]References to items in the Superior Court Clerk's Record (M.R. Crim. P. 39(c)) shall be in parentheses as follows: (R. at___).

caricature. The back of the T-shirt read, "THEY FINALLY GOT THE BIG ONE." App. A at 8 n.2.

On August 18, 1992, the following pretrial discussion occurred among the Prosecutor (Ms. Ames), Defense Counsel (Mr. Dardis), and the Trial Court relative to the admissibility of the T-shirt:

> THE COURT: Okay. I will say there is -- we're going to get into this T-shirt only if there is evidence tying financial interest in the T-shirt to the victim.
>
> MR. DARDIS: I will ask her on cross-examination whether or not she was involved in the sale of or the distribution of the T-shirt.
>
> THE COURT: Of a T-shirt, of a T-shirt.
>
> MR. DARDIS: I take it at that point the Court is indicating they don't want me to offer the T-shirt or show it at that point?
>
> THE COURT: Obviously, not. If she denies it you have to have some other separate, independent knowledge, but she --

MR. DARDIS: She was involved in the sale.

THE COURT: If somebody testifies she was involved in the sale of it it can come in too if she was involved in the sale.

MR. DARDIS: The witness will be testifying that she was directly involved.

THE COURT: That is the State's call, whatever. We'll have to see. We'll probably get that out of the presence of the jury.

MR. DARDIS: That testimony?

THE COURT: Unless it's clearly going to be offered, whatever. We've got to resolve that out of the presence of the jury before we develop it in the presence of the jury.

(Transcript dated August 18, 1992, at 8-9).

On August 19, 1992, prior to the calling of the State's first witness in Respondent's jury trial, the Prosecutor, Defense Counsel, and the Trial Court had the following discussion relative to the admissibility

of evidence concerning Shani Orne's sale of the T-shirt:

> MR. DARDIS: Your Honor, the defense proposes to offer the evidence of a witness who is going to testify that he bought a T-shirt from Shani Orne at Shani Orne's house.
>
> That witness will also testify that Shani Orne discussed with him the fact that she shouldn't be selling the T-shirts because she was instructed not to. Perhaps the appropriate method of handling this for the court to take a voir dire of that testimony and then make a decision.
>
> . . . .
>
> THE COURT: It seems to me as I understood what was going to be asked was a question which would appear in innocuous: Did you ever sell a T-shirt to so and so; yes or no?.
>
> MR. DARDIS: Essentially, Your Honor, that would be the line of questioning.
>
> THE COURT: That's what I understood.

MR. DARDIS: We weren't going to subject -- I was not going to pull the T-shirt out.

THE COURT: Did you sell -- did you ever sale a T-shirt to so and so, right, something like that?

MR. DARDIS: Something along those lines, yes. Your Honor, I will not be going beyond did she sell a T-shirt to so and so or sell T-shirts in general without offering what the T-shirt indicates.

THE COURT: Any suggestion that says anything -- any suggestion it is related to the case, a T-shirt generic.

MR. DARDIS: That is right. She can admit that or deny she was involved in that.

THE COURT: Okay. As I indicated I will allow that question based on the offer of proof which we had yesterday and today. Okay. We'll take a brief break.

(T., Vol. I at 30-31).[2]

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[2]References to pages in the two-volume trial transcript (M.R. Crim. P. 39(b)) shall be in parentheses as follows: (T., Vol.___ at ___).

Shani Orne, who was 21 years old at the time Respondent raped her, was the State's first witness. (T., Vol. I at 32). During cross-examination, Defense Counsel asked Shani the following questions:

> Q Have you sold or have you been involved in the sale of any T-shirts that depict or show this incident?
>
> A No.
>
> Q You are absolutely certain of that?
>
> A Yes.
>
> Q Do you know who Jerry Martin is?
>
> A Yes.
>
> Q Who is Jerry Martin?
>
> A He's married to my aunt.

(T., Vol. I at 140-41).

After Shani Orne finished her testimony, the Prosecutor, Defense Counsel, and the Trial Court had the following discussion relative to the T-shirt issue:

> MS. AMES: One other point while we're back here to the T-shirt again. My understanding of the way you wanted the T-shirt even brought up was whether she had sold a T-shirt.
>
> THE COURT: Yep. The question was asked, was there a T-shirt depicting this event?
>
> THE COURT: I sustained an objection. It had been asked. I thought it went beyond.
>
> MS. AMES: That just puts me between a rock and a hard place of objecting to something and highlighting it more.
>
> THE COURT: Yes.
>
> MS. AMES: I would ask that there is no financial link to Shani Orne of that shirt and that any further inquiry not be allowed. It's already been violated. There is no evidence and there is no evidence linking Shani to the family member that Mr.

Dardis has now identified as the uncle married to Shani's aunt.

MR. DARDIS: No, no, no. That's a total misunderstanding of what the evidence is going to be.

MS. AMES: Unless Mr. Dardis can present a signed receipt that Shani Orne signed that or she got any financial gain or that outside the presence of the jury you can put a witness on that's going to testify that someone gave Shani Orne money from the profits of sale of those T-shirts. I would ask that any further reference to the shirt be excluded.

MR. DARDIS: I will renew my offer of proof as to what's going to go in. There is going to be direct testimony that Shani directly or personally sold a T-shirt to a member of her own family, among other things, not a member of the family but to a person, direct testimony on that issue.

THE COURT: Okay. I am wondering there is clearly a bunch of other evidence about the reasons she may have to be biased, stuff like that. I am wondering why that is significant. You know, I guess my concern is based on what you folks

described the T-shirt is more likely to inflame the jury than aid. I don't know which way it cuts.

I am concerned that things like that because of their nature have sort of emotional significance all out of proportion to their real evidentiary value, which is solely cumulative on the question of bias. You're going to have other evidence that she is, you know -- has biases that are causing her to do what she does too.

MR. DARDIS: I am wondering. Yes. I'm sorry.

THE COURT: This sale of the T-shirt is sort of cumulative on a bias issue. It's not on a direct factual issue.

MS. AMES: Let me indicate that if it's the sale of one, the shirt -- I mean the bias that Mr. Dardis was saying that she had an ongoing financial gain interest with the continued sale of these T-shirts -- you know, if there is -- if he can ever produce A, one, a shirt purchased from Shani that does indicate a financial gain.

MR. DARDIS: The testimony will be -- I don't know that when the whole transaction comes in.

THE COURT: Well, I guess what I am saying I want no further references -- in my view your question went beyond what we agreed to. I talked about generic, didn't tie it to the case. When I say something I don't want something beyond that to happen.

MR. DARDIS: I didn't understand that question.

THE COURT: Be more cautious. Now you tied it to the case as opposed to selling a T-shirt which I thought we talked about.

What I will say in front of the jury no more references to the shirt, the shirt transaction unless we see something out of the presence of the jury that changes my mind as of -- no reference to the shirt in front of the jury.

MR. DARDIS: When I plan to call that evidence we'll have a voir dire on that.

THE COURT: Yes.

(T., Vol. I at 151-54).

During the case-in-chief of the Defense, Jerry Martin, a relative of Shani Orne, was voir dired outside the presence of the jury. (T., Vol. II at 415-28). At the conclusion of this voir dire, the Trial Court ruled that Jerry Martin's testimony on the T-shirt issue was inadmissible under M.R. Evid. 403[3]:

> THE COURT: Okay. Well based on my review of the matter here, hearing the testimony today I think in fact I would regard this as cumulative bias evidence. That doesn't mean it can't come in. It's clearly cumulative, a lot of other evidence to show why there is dislike between Shani Orne and the Defendant.

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[3]M.R. Evid. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I think this if admitted would be given significance all out of proportion to that real value in the matter because of the particular description and so forth. In my view, therefore, it's far more prejudicial than probative.

I also note the witness being offered repeatedly answered, volunteered far beyond the responses -- far beyond the questions asked, which could create some risk. There that's not the reason I am excluding it. I am excluding it because it's far more prejudicial than probative in the circumstances of this case where there is plenty of other evidence that animosity exists between the parties, between Shani Orne and the Defendant.

I don't see any sufficient evidence offered by this Defendant, by this witness sort of large economic scheme to make a great deal of profit off of this. That's not supported. If that -- you know, that's sort of -- if anything it's based on hearsay. I don't know who was actually making these T-shirts. It appeared someone else was making them, not the Ornes, based on what the testimony was.

> So I am going to basically sustain the State's objection, exclude this testimony in this matter. For housekeeping matters I believe that one of the T-shirts is already in the courtroom that was marked. So we'll take that. Thank you. Okay.

(T., Vol. II at 431-32).

The jury found Respondent guilty of gross sexual assault as charged in the indictment, and Respondent was sentenced to twelve years imprisonment with all but eight years suspended and to six years probation.

On appeal, Respondent raised the following issue:

> Did the Superior Court err by excluding the proffered testimony of Jerry Martin on the grounds that the testimony was more prejudicial than probative under Maine Rule of Evidence 403?

(Brief of Appellant at 27). Respondent claimed that the Defense, "through the testimony of Jerry Martin,

proposed to demonstrate the victim's bias, pursuant to Rule 607 of the Maine Rules of Evidence."[4] (Brief of Appellant at 27). Respondent argued that Jerry Martin's proposed testimony about his purchase of a T-shirt from Shani Orne and her mother Linda was offered as

> evidence of bias in that the victim had acquired a financial interest in the allegations she had made and had an interest in the continuation and propagation of those allegations. In addition, the T-shirt, when offered into evidence and speaking for itself, would show an animus on the part of the victim, which is another type of bias. Based on this evidence, Defendant was entitled to argue at closing that the T-shirt not only showed a financial interest on the part [of] the victim, but equally important that the victim and her

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[4]M.R. Evid. 607, entitled "WHO MAY IMPEACH," states:

> The credibility of a witness may be attacked by any party, including the party calling him.

> family were out to "get" the Defendant, which was the very language of the T-shirt.

(Brief of Appellant at 28).

In its brief to the Maine Supreme Judicial Court, Petitioner responded that the Trial Court's finding that Shani Orne had "no large economic scheme to make a great deal of profit off of this" (T., Vol. II at 432) was supported by the voir dire testimony of Jerry Martin. Martin testified that he bought only one T-shirt from Shani Orne and her mother Linda and that he did not witness the sale of any other T-shirts. (T., Vol. II at 425-26). There was no evidence that Shani and Linda Orne were making the T-shirts, or even making a profit from the sale of T-shirts,[5] and

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[5]The suggestion in Martin's voir dire testimony 1) that he paid $20 for the T-shirt or 2) that the T-shirt cost $15 and he gave Shani and Linda Orne a $20 bill and told them to keep the change (T., Vol. II at 419, 425) does not show that Shani and Linda were in the business of - or profiting from - the sale of T-shirts.

Martin did not know who was making the T-shirts. (T., Vol. II at 426, 421-22). Although Martin testified on voir dire that Shani referred to a "supply" of T-shirts (T., Vol. II at 417-18), Martin saw only the one T-shirt that was sold to him, and there was no evidence that it was Shani or Linda Orne who had the supply of T-shirts or that they did anything more than provide Jerry Martin at no profit to themselves with a T-shirt they had obtained from someone else who did have the supply of T-shirts caricaturing Respondent. Hence, Jerry Martin's proposed testimony was of slight probative value, at best, in demonstrating that Shani had a financial incentive to fabricate a rape charge against Respondent. (Brief of Appellee at 38).

As for the issue of "animus," Petitioner argued that, as the Trial Court recognized (T., Vol. II at 431), Martin's testimony about Shani's sale of the T-shirt

was no more than "cumulative bias evidence.... It's clearly cumulative, a lot of other evidence to show why there is dislike between Shani Orne and the Defendant." (T., Vol. II at 431). This other evidence of Shani's hostility and bias against Respondent included Shani's testimony that she had previously been raped by Respondent in late 1989 or early 1990 (T., Vol. I at 93-99, 135), evidence that Shani was having difficulty making rent payments to Respondent, who was her landlord, and yet Respondent was insisting that the rent payments be made on time (T., Vol. I at 141-42), evidence that the toilet in Shani's apartment was broken causing further landlord-tenant problems between Shani and Respondent (T., Vol. I at 44; T., Vol. II at 507-08), and Naomi Reed's testimony that when Naomi told Shani in approximately August 1989 that Shani "could get Daren in big trouble [for having sex with

him] where he was a cop and that he was a lot older than her," Shani responded "[t]hat she didn't care." (T., Vol. I at 352). (Brief of Appellee at 38-40).

Petitioner argued that for all of these reasons the Trial Court did not abuse its discretion under M.R. Evid. 403 in excluding Jerry Martin's testimony about Shani's sale of a T-shirt to him.

The oral argument in the Maine Supreme Judicial Court on January 5, 1994, focused on whether Jerry Martin's testimony should have been admitted under M.R. Evid. 403 as reflecting on the bias or credibility of Shani Orne. In this regard, there was considerable discussion among the justices and counsel for both parties as to whether Jerry Martin's voir dire testimony was sufficient to establish an economic relationship between Shani Orne and the sale of the T-shirt, i.e., to establish bias by Shani.

On March 14, 1994, the Maine Supreme Judicial Court issued its written decision, which vacated Respondent's judgment of conviction on the ground that the Trial Court's exclusion of Jerry Martin's proposed testimony violated Respondent's constitutional right to confront and cross-examine the witnesses against him and was not harmless error. In reaching this result, the Maine Supreme Judicial Court relied heavily on Davis v. Alaska, 415 U.S. 308 (1974),[6] where the United States Supreme Court held that a state trial court had violated a

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[6]The Maine Supreme Judicial Court's decision is based on the sixth amendment Confrontation Clause and Davis v. Alaska, 415 U.S. 308 (1974). Although the Maine Supreme Court also cites to the Maine Constitution, Article I, Section 6 as a source of Respondent's confrontation right (App. A at 15 n.5), there is no "plain statement" within the meaning of Michigan v. Long, 463 U.S. 1032 (1983), that the Maine Supreme Court's decision is based on an adequate and independent state ground. See also Delaware v. Van Arsdall, 475 U.S. 673, 678 n.3 (1986).

defendant's sixth amendment confrontation right when the defendant was not permitted to cross-examine a juvenile prosecution witness about the juvenile's probationary status, a factor bearing on the credibility of the witness.

This sixth amendment confrontation right was raised and mentioned for the first time in the written decision of the Maine Supreme Judicial Court without any opportunity for Petitioner to address the confrontation-right issue. This issue was neither briefed nor orally argued in the Maine Supreme Judicial Court or in the Trial Court. The only issue argued in the Trial Court and briefed and argued in the Maine Supreme Judicial Court was whether Jerry Martin's proposed testimony was admissible under M.R. Evid. 403.

Petitioner filed a motion for reconsideration dated March 23, 1994, in the Maine Supreme Judicial

Court. Since the confrontation-right issue was raised for the first time on appeal and on the initiative of the Maine Supreme Judicial Court after oral argument was over so that there was no opportunity for Petitioner to focus the Maine Supreme Court's attention on the relevant parts of the record or on the scope of the sixth amendment confrontation right, Petitioner asked in its motion that the Maine Supreme Court utilize an obvious error-due process standard of review rather than the harmless error test. Petitioner also pointed out that the Trial Court, in compliance with Davis v. Alaska, 415 U.S. 308 (1974), and Delaware v. Van Arsdall, 475 U.S. 673 (1986), had expressly given Defense Counsel the opportunity to ask Shani Orne on cross-examination if she had ever sold a T-shirt to Jerry Martin (T., Vol. I at 30-31), and that Defense Counsel had failed to follow up on that opportunity. Hence, there had been

no violation of Respondent's sixth amendment confrontation right.

Petitioner's motion for reconsideration was denied by the Maine Supreme Judicial Court on March 31, 1994, in a one-sentence order (Appendix C at 25), without any analysis or written decision.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

BY REQUIRING THAT RESPONDENT BE ALLOWED TO PUT ON AN IMPEACHMENT WITNESS FOR THE DEFENSE, THE DECISION OF THE MAINE SUPREME JUDICIAL COURT CONSTITUTES AN UNWARRANTED EXTENSION OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

In Delaware v. Van Arsdall, 475 U.S. 673 (1986), this Court, quoting Davis v. Alaska, 415 U.S. 308, 315-16 (1974), stated with emphasis that

> "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'" *Id.*, at 315-316, 94 S.Ct., at 1110 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra,* at 316-317, 94 S.Ct., at 1110 (citing *Greene v. McElroy,* 360 U.S. 474, 496 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959))... And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) (emphasis in original).

Van Arsdall, 475 U.S. at 678-79.

Respondent had this opportunity for effective cross-examination in this case, and there was thus no violation of his sixth amendment confrontation

right. That is, the Trial Court in fact allowed Defense Counsel to ask Shani Orne on cross-examination if she had ever sold a T-shirt to Jerry Martin:

> THE COURT: It seems to me as I understood what was going to be asked was a question which would appear in innocuous: Did you ever sell a T-shirt to so and so; yes or no?
>
> MR. DARDIS: Essentially, Your Honor, that would be the line of questioning.
>
> THE COURT: That's what I understood.
>
> MR. DARDIS: We weren't going to subject -- I was not going to pull the T-shirt out.
>
> THE COURT: Did you sell -- did you ever sale a T-shirt to so and so, right, something like that?
>
> MR. DARDIS: Something along those lines, yes. Your Honor, I will not be going beyond did she sell a T-shirt to so and so or sell T-shirts in general without offering what the T-shirt indicates.

> THE COURT: Any suggestion that says anything -- any suggestion it is related to the case, a T-shirt generic.
>
> MR. DARDIS: That is right. She can admit that or deny she was involved in that.
>
> THE COURT: Okay. As I indicated I will allow that question based on the offer of proof which we had yesterday and today. Okay. We'll take a brief break.

(T., Vol. I at 30-31).

Even though the Trial Court ruled that Defense Counsel could cross-examine Shani Orne as to whether she had ever sold a T-shirt to "so and so," Defense Counsel instead asked the following questions:

> Q Have you sold or have you been involved in the sale of any T-shirts that depict or show this incident?
>
> A No.
>
> Q You are absolutely certain of that?

A Yes.

Q Do you know who Jerry Martin is?

A Yes.

Q Who is Jerry Martin?

A He's married to my aunt.

(T., Vol. I at 140-41). Defense Counsel never asked whether Shani had ever sold a T-shirt to Jerry Martin, but instead went off on the following tack:

Q Now during the period of time that you rented the house from Mr. Graves did you have any problem paying the rent?

A Yes.

(T., Vol. I at 141).

Because Defense Counsel was permitted to ask Shani about the sale of a T-shirt to Jerry Martin, this case is not like Davis v. Alaska, 415 U.S. 308 (1974), where the defendant was prohibited from inquiring into the prosecution witness' bias. Rather, in this

case, Defense Counsel had ample opportunity "to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis, 415 U.S. at 318. That is, there was no violation of Respondent's sixth amendment right "to be confronted with the witnesses against him."

Moreover, the admissibility of Jerry Martin's proposed testimony attacking the credibility of Shani was an evidentiary matter to be governed by the rules of evidence.[7] This issue had absolutely nothing to do

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[7]Note that because Defense Counsel never took advantage of the opportunity to ask Shani as to whether she had ever sold a T-shirt to Jerry Martin, there was nothing to be impeached with Jerry Martin's proposed testimony that the sale of a T-shirt had occurred. Although Shani denied that she had ever "been involved in the sale of any T-shirts that depict or show this incident" (T., Vol. I at 140), Jerry Martin's proposed testimony would not have impeached Shani's denial because the T-shirt did not

with Respondent's sixth amendment right "to be confronted with the witnesses against him," particularly as Jerry Martin was a witness for, not against, Respondent. The sixth amendment confrontation right does not require - and has never been held to require - that a defendant be allowed to put on a witness to impeach the credibility of a prosecution witness.

Nowhere in any of the United States Supreme Court decisions addressing the Confrontation Clause is there any suggestion that the Confrontation Clause has anything to do with the facts of this case. Rather, confrontation clause violations have been limited to situations where there has not been an opportunity for effective cross-examination of prosecution or adverse witnesses. E.g., Pointer v. Texas, 380 U.S. 400

"depict or show this incident," i.e., the rape, but instead caricatured Respondent.

(1965) (preliminary hearing testimony inadmissible where defendant lacked counsel to assist in cross-examination at the hearing); Smith v. Illinois, 390 U.S. 129 (1968) (trial judge should have allowed defense to cross-examine the principal prosecution witness, a police informer, about his true name and address); Davis v. Alaska, 415 U.S. 308 (1974) (state's legitimate interest in protecting the anonymity of juvenile offenders could not be used to bar cross-examination of key prosecution witness, a juvenile, about his juvenile delinquent probationary status); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (trial court should have allowed defense inquiry into the possibility that prosecution witness was biased as a result of state's dismissal of pending public drunkenness charge, which "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony"); Olden v.

Kentucky, 488 U.S. 277 (1988) (per curiam) (trial court should have allowed black male defendant in kidnapping, rape, and sodomy trial to cross-examine white female complainant about her cohabitation with black boyfriend as such evidence was relevant to defendant's claim that he and complainant engaged in consensual sexual acts and that complainant - out of fear of jeopardizing her relationship with her black boyfriend - lied when she told her boyfriend that she had been raped).

The decision of the Maine Supreme Judicial Court in this case not only extends Confrontation Clause protection beyond anything heretofore known but also makes bad policy. For under the Maine Supreme Court's decision, everyday evidentiary issues about whether to admit impeachment evidence for the defense become elevated to constitutional questions relating to a defendant's

right to have such evidence admitted in order to "confront" - i.e., attack the credibility of - prosecution or adverse witnesses. This constitutional gloss over evidentiary concerns means that impeachment or bias evidence gets admitted, as in the decision of the Maine Supreme Court, regardless of its dearth of probative value, its tendency to confuse or mislead the jury, or its prejudicial or cumulative nature. The Confrontation Clause is not meant to produce such a result or to interfere so drastically with a trial court's discretionary authority over the admissibility of evidence. See Van Arsdall, 475 U.S. at 679 ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally

relevant"); see also Taylor v. Illinois, 484 U.S. 400, 414-15 (1988) (a defendant's mere invocation of the right to offer the testimony of witnesses in his behalf "cannot automatically and invariably outweigh countervailing public interests," which are concerned with "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence" and "the potential prejudice to the truth-determining function of the trial process").

Since the decision of the Maine Supreme Judicial Court constitutes an unwarranted extension of the sixth amendment Confrontation Clause beyond anything suggested in the Confrontation Clause decisions of this Court, Petitioner asks that the decision of the Maine Supreme Judicial Court be summarily reversed by this Court.

II

SINCE THE STATE HAD NO OPPORTUNITY TO ADDRESS THE SCOPE OF THE CONFRONTATION CLAUSE AND NO NOTICE TO DEVELOP A RECORD FOCUSED SPECIFICALLY ON THIS ISSUE, THE MAINE SUPREME JUDICIAL COURT SHOULD HAVE APPLIED THE PLAIN ERROR TEST DISCUSSED IN UNITED STATES V. OLANO, 113 S.CT. 1770 (1993), NOT THE HARMLESS ERROR TEST OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967).

The Maine Supreme Court's unwarranted extension of the Confrontation Clause beyond anything suggested in the decisions of this Court points to the second reason why this petition should be granted - i.e., there was no opportunity for Petitioner to address the scope of the Confrontation Clause or even develop a record focused specifically on this issue. Because the Confrontation Clause was raised and discussed for the first time in the Maine

Supreme Court's written decision, the Maine Court, in utilizing the harmless error test, applied the wrong standard of appellate review. A plain error test should have been used.

In Arizona v. Fulminante, 111 S.Ct. 1246 (1991), the Supreme Court stated that the harmless error test is appropriate in cases involving

> "trial error" - error which occurred during the presentation of the case to the jury, and which may therefore be quantatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Fulminante, 111 S.Ct. at 1264. This statement assumes that the error has been preserved for appellate reivew, i.e., that there has been an opportunity for the parties to develop an adequate record relative to the issue in question so that an appellate court can make a fair and accurate

determination as to whether the error is harmless in the context of the entire case.[8]

In the instant case, however, where the Maine Supreme Court raised the Confrontation Clause issue sua sponte after all argument in the case was over, there was no opportunity for the State to develop a record in the Trial Court specifically directed to the Confrontation Clause issue or even to point out on appeal those parts of the record which demonstrate that Respondent's confrontation right was not violated. Although Jerry Martin's voir dire testimony established a record for purposes of determining the

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[8]See also Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986), where the Supreme Court, in stating that "[w]hether... an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts," is once again assuming that the "host of factors" is "readily accessible" to an appellate court because there has been an opportunity at the trial level for the parties to make an adequate record so that the appellate court can make an accurate determination of whether any error is harmless.

admissibility of his testimony under M.R. Evid. 403, this record was not adequate for purposes of Confrontation Clause analysis because it was not directed to - indeed, it had nothing to do with - the question of whether Respondent had an opportunity for effective cross-examination of Shani Orne.

Moreover, the record developed in this case for purposes of Rule 403 was for a different standard of appellate review than the standard for constitutional issues. That is, for evidentiary issues, a trial court's ruling is reviewed simply for whether the trial court has abused its discretion. Under this standard, a trial court's ruling is rarely reversed because all that is required is for an appellate court to find a rational basis in the record to sustain the trial ruling. As a constitutional question, however, Confrontation Clause issues are reviewed under the harmless error standard of Chapman v. California, 386 U.S. 18 (1967),

where the prosecution has to establish beyond a reasonable doubt that a violation of the Confrontation Clause did not contribute to a conviction. Olden v. Kentucky, 488 U.S. 227 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 680-84 (1986).

Although the harmless error standard involves a far more difficult burden for the State to meet, in the instant case the State was never on notice, at either the trial or appellate level,[9] that it was subject

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[9] Although Confrontation Clause issues in Olden v. Kentucky, 488 U.S. 227 (1988), and Delaware v. Van Arsdall, 475 U.S. 673 (1986), were subjected to the harmless error test of Chapman v. California, 386 U.S. 18 (1967), in both of those cases the Confrontation Clause issue was actually addressed by the parties in the state appellate court and may have even been raised at the trial level. Hence, the parties in each case had the opportunity to address the scope of the confrontation right and to provide the appellate court, if not the trial court, with an analysis of the Confrontation Clause as applied to the facts of the case, and to develop an appropriate record at the trial level or to point out deficiencies in that record at the appellate level. The harmless error test could therefore be applied in each case with confidence that

to that higher standard as to Jerry Martin's proposed testimony. Hence, because Martin's voir dire testimony alone satisfied the lower, Rule 403 abuse of discretion standard by establishing only a one-time sale of the T-shirt by Shani, there was no need for the State to further establish through other witnesses that 1) any comment by Shani to Martin about a "stock" of T-shirts (App. A at 19) was referring to the manufacturer's stock of T-shirts and 2) Shani was not in the business of and not profiting at all from selling T-shirts. Had the State known that there was a constitutional issue involved, then it would have gone to the expense of putting on additional evidence to satisfy the higher, harmless error standard.

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there was an adequate record to apply it to and that a fair and accurate decision could be reached.

Since the State was not given "fair warning and a timely opportunity" (United States v. Griffin, 818 F.2d 97, 100 (1st Cir. 1987)) at the trial level to address Martin's proposed testimony in terms of the Confrontation Clause, the Maine Supreme Court should have utilized the plain error test discussed in United States v. Olano, 113 S.Ct. 1770 (1993), in evaluating Respondent's confrontation right on appeal. In Olano, 113 S.Ct. at 1776, the Supreme Court stated:

> "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 667, 88 L.Ed. 834 (1944). Rule 52(b) of the Federal Rules of Criminal Procedure, which governs on appeal from criminal proceedings, provides the Court of Appeals a limited power to correct errors that were forfeited

because not timely raised in the District Court. The Rule has remained unchanged since the original version of the Criminal Rules, and was intended as "a restatement of existing law." Advisory Committee's Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C.App., p. 833. It is paired, appropriately, with Rule 52(a), which governs nonforfeited errors. Rule 52 provides:

> "(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> "(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Although "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with... the rules of fundamental justice," *Hormel v. Helvering*, 312 U.S. 552,

> 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941), the authority created by Rule 52(b) is circumscribed. There must be an "error" that is "plain" and that "affect[s] substantial rights." Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

Just as in Chapman v. California, 386 U.S. 18 (1967), where the harmless error doctrine was extended to apply to state cases involving constitutional error, so this case presents the opportunity to extend the plain error doctrine to constitutional issues which have not been raised in a timely manner at the state trial

level and where there is thus not an adequate record for application of the harmless error test.[10]

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[10]It is not fair to the states that the Supreme Court should authorize a plain error test in cases prosecuted by the United States without conferring the same benefit upon the states. That is, if the United States, which is bound directly by the bill of rights, is entitled to a plain error test, then the states, which are bound to follow the bill of rights only indirectly through the fourteenth amendment and the decisions of this Court, should have at least the same benefit.

Maine, like virtually every other state, in fact has a provision in its own rules of criminal procedure corresponding to the federal plain error test. Rule 52(b) of the Maine Rules of Criminal Procedure is entitled "Obvious Error" and states:

> Obvious errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The Maine Supreme Court should be mandated to apply this test to the facts of this case, as a matter of federal law.

The Maine Supreme Court applied the harmless error test presumably because it felt obligated to do so on the basis of Van Arsdall and Olden. This Court should clarify that in a case like this one, the plain

Moreover, the question of whether a plain error or harmless error test should be used in this case is a matter of federal law, not state. For in Chapman v. California, 386 U.S. 18 (1967), the Supreme Court stated that where federal constitutionally guaranteed rights are involved, the formulation of procedures governing the applicability of or entitlement to the protections of those rights is a matter of federal law and cannot be left to the states. Chapman, 386 U.S. at 20-21.

In this case, where the issue involves the scope of protection afforded by the sixth amendment Confrontation Clause, the appellate standard of review of that issue is a matter of federal law. The plain error test should be used to evaluate the Confrontation Clause issue because there was no

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error test, not the harmless error test of Van Arsdall and Olden, applies.

notice to the State that the admissibility of Jerry Martin's proposed testimony involved a federal constitutional question.

Finally, there is no plain error in this case. First, there is no error as there was no violation of Respondent's confrontation right. Second, the record plainly shows that Respondent had the opportunity to cross-examine Shani about her sale of the T-shirt to Jerry Martin. And third, the record is not plain that the Trial Court's ruling excluding Jerry Martin's testimony affected substantial rights as Martin's voir dire testimony did not demonstrate any clear relationship between Shani and the profits made from the sale of the T-shirt, and thus did not plainly impeach Shani, i.e., establish any economic incentive for Shani to fabricate a rape charge against Respondent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Daren L. Graves, 638 A.2d 734 (Me. 1994).

Respectfully submitted,

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Dated: June 22, 1994

APPENDIX A

Maine Supreme Judicial Court

Reporter of Decisions
Decision No. 6812
Law Docket No.
Ken-93-32

STATE OF MAINE
V.
DAREN L. GRAVES

Argued January 5, 1994
Decided March 14, 1994

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

GLASSMAN, J.

Daren L. Graves appeals from a judgment entered in the Superior Court (Kennebec County, *Alexander, J.*) on a jury verdict finding him guilty of gross sexual assault, 17-A M.R.S.A. § 253 (Supp. 1993).[1]

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[1]In relevant part, the statute provides:

> A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:
>
> A. The other person submits as a result of compulsion, as defined in

Graves contends, *inter alia*, that the trial court erred by refusing to suppress a prearrest statement he made to investigators during an interview in his supervisor's office and by refusing to admit evidence of the complaining witness's involvement in marketing and selling a T-shirt publicizing the case. Because we agree with Graves that the trial court improperly excluded

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section 251, subsection 1, paragraph E.

17-A M.R.S.A. § 253(1)(A) (Supp. 1993).

> "Compulsion" means the use of physical force, a threat to use physical force or a combination thereof that makes a person unable to physical repel the actor or produces in that person a reasonable fear that death, serious bodily injury or kidnapping might be imminently inflicted upon that person or another human being.
>
> "Compulsion" as defined in this paragraph places no duty upon the victim to resist the actor.

17-A M.R.S.A. § 251(1)(E) (Supp. 1993).

evidence concerning the T-shirt, we vacate the judgment.

The record reveals that without objection the jury heard the following testimony: Graves was a police officer with the Boothbay Harbor Police Department. From November 1990 to late February 1991, the twenty-two-year-old complaining witness worked as a babysitter and resided in a house, which she rented from Graves, located approximately 500 yards from his residence. She had known Graves since June 21, 1989, when he assisted in her rescue after the car she was operating went off a bridge into forty feet of water. Prior to February 20, 1991, she had babysat for Graves's young son and the two young children of his girlfriend, all of whom resided with Graves. In February 1990, while she was caring for Graves's son at his house, Graves had come home while on patrol, taken her into his bedroom, pushed her onto his bed,

sat on her while removing her clothing, and had sexual intercourse with her. She neither reported this incident nor discussed it with anyone.

Shortly after 10:00 p.m. on February 20, 1991, Graves telephoned the complaining witness requesting that she babysit for his son while he transported an emergency care patient to Portland. She assented but requested that Graves provide transportation to his home. On reaching the Graves residence, she went to the bathroom and emerged to find Graves partially unclothed. Graves grabbed her, pinned her against a wall, began kissing her, and physically struggled with her until she was forced into his bedroom. He then ripped off her underpants, sweat pants, shoes and socks, pushed up her nightgown and sweat shirt, poured baby oil on her body, and, despite her protests, had sexual intercourse with her twice. Thereafter, she pushed him away, put

on her sweat pants, shoes and socks, grabbed her jacket, and ran out of the house and back to her own home where she telephoned various friends. She reported the alleged assault to the authorities on February 22. During the course of the police investigation, the complaining witness initially denied having any previous sexual relationship with Graves.

The jury also heard further testimony that Graves and the complaining witness had an ongoing sexual relationship that began after the rescue incident in June 1989. On February 20, 1991, Graves had been in Portland where he had been drinking extensively. On his return to his home at about 10:00 p.m. he telephoned the complaining witness to ask if she wanted to come to his home. She stated that she did and "would be right down." On her arrival, they kissed and embraced. They went into his bedroom

where he removed her sweat pants, sneakers and underpants as well as his blue jeans and underwear. They engaged in consensual physical intimacies. After approximately twenty or thirty minutes, when it became apparent he could not consummate sexual intercourse, she became upset, dressed, and left the house.

On February 22, 1991, Graves received a telephone call from his supervisor, Chief Floyd McDonough, telling him to come to the police station immediately. Graves complied, and was interviewed there by Detective Richard Fairfield from the office of the Attorney General and Detective Seth Blodgett of the Lincoln County sheriff's department. During the interview, Graves first denied that the complaining witness had been at his house on the night in question. He later admitted that she had been present, but denied any sexual contact. Still later, Graves stated

that he had sought to have sexual intercourse with the complaining witness and that her response was, "I'm not going to say no... [but] I'm just going to lay here." He admitted that he had been lying to the investigators when he had initially denied any sexual contact with her and that some of his responses to the investigators had been "evasive."

Following his indictment on a charge of gross sexual assault, Graves filed a motion to change the venue of the trial and to suppress the introduction in evidence of his statement of February 22. After a hearing, the court (Lincoln County, *Bradford, J.*) granted the change of venue, but denied Graves's motion to suppress the statement.

The state made, *inter alia*, a motion *in limine* to exclude "any and all evidence of the existence of a T-shirt depicting Daren Graves" because "[a]ny inquiry into the creation, description, or sale of such a T-shirt

would be improper evidence of bias and any probative value would be greatly outweighed by its prejudicial value and may lead to confusion of the jury."[2] Graves argued he was entitled to demonstrate the bias of the complaining witness as evidenced by her financial interest in the marketing, promoting or selling of the T-shirt. The court ruled that if on cross-examination the complaining witness denied any involvement in the sale or distribution of the T-shirt, Graves would not be permitted to introduce any evidence of the T-shirt absent some separate, independent evidence that the complaining witness was involved in its sale.

At the trial, on cross-examination of the complaining witness by Graves, she denied any

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[2]The front of the T-shirt depicted Graves in handcuffs, with a third cuff attached to his exposed and erect penis. Beside the drawing appeared the words "AIN'T GETTIN OFF... THIS TIME." Words on the back of the T-shirt read, "THEY FINALLY GOT THE BIG ONE."

involvement in the sale of the T-shirt. Following offers of proof by Graves without the presence of the jury, the court held that Graves could not introduce any evidence concerning the T-shirt because it was cumulative on the issue of bias and would tend to unfairly prejudice the State's case.

From the judgment entered on the jury's verdict of guilty, Graves appeals. He does not contend that the evidence adduced at trial was insufficient to sustain the verdict, but seeks a new trial based on the challenged evidentiary rulings by the court.

I.

Graves first contends that because his statement was involuntary, the trial court erred in denying his pretrial motion to suppress the evidence of his interview with Fairfield and Blodgett. We disagree. The State bears the burden of establishing beyond a reasonable doubt that a statement made to

investigators by a defendant was voluntary. *State v. Smith*, 615 A.2d 1162, 1163 (Me. 1992). "A trial court should determine whether a statement is voluntary by considering the totality of the circumstances." *Id.* "A confession is voluntary if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all the circumstances its admission would be fundamentally fair." *Id.* (quoting *State v. Mikulewicz*, 462 A.2d 497, 501 (Me. 1983)). We review for clear error a trial court's finding that the State has met its burden as to voluntariness. *State v. Smith*, 615 A.2d at 1163.

At the suppression hearing, the court heard the following evidence: Fairfield and Blodgett went to the headquarters of the Boothbay Harbor Police Department to locate Graves. In response to their inquiry, McDonough advised the investigators that Graves had the day off and then picked up a telephone

and called Graves. Graves was home in bed with a cold when the telephone rang, and McDonough directed him to come to the station immediately without giving a reason. Graves complied. On seeing Fairfield and Blodgett, Graves asked, "What did I do know?", an apparent reference to a previous inquiry by the same investigators concerning Graves's conduct in a separate matter. The formal interview began shortly after 2:00 p.m. Graves testified that he did not feel at liberty to leave the interview or to decline to submit to the questioning.[3] He had, however, verbally agreed to the interview. Fairfield had advised him that he was free to leave at any time, and Chief McDonough did not tell him that his job would be in jeopardy if he did not submit to the interview.

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[3]The investigators did not give Graves any warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Graves does not raise this issue on appeal.

Graves's reliance on *Moffett v. City of Portland*, 400 A.2d 340 (Me. 1979) is misplaced. *Moffett* was a civil proceeding in which we agreed with a group of six police officers that they were entitled to an injunction to prevent the City of Portland from publicly releasing transcripts of statements made by the officers during an internal investigation of alleged police brutality. *Id.* at 341, 348. The case turned on whether the documents were protected from disclosure by a provision of the Freedom of Access Act, 1 M.R.S.A. § 402(3)(B) (1989 & Supp. 1993) (exempting from disclosure any government records that would be within the scope of an evidentiary privilege at a civil or criminal trial). We held that the transcripts in question were protected from public disclosure by the Act in light of the officers' constitutional privilege to avoid self-incrimination. *Moffett v. City of Portland*, 400 A.2d at 345. We noted

that the City of Portland had conceded that the officers' statements were involuntary. Thus the question of voluntariness was not at issue in *Moffett*, and the case offers no support for Graves' position that a statement made by a police officer in the course of a criminal investigation cannot be voluntary because any resulting conviction would likely affect the officer's job status.[4]

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[4]The federal cases cited by Graves are similarly unavailing. *Garrity v. New Jersey*, 385 U.S. 493 (1967) involved statements concerning "ticket fixing" made by police officers in the course of an internal investigation. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the United States Supreme Court invalidated a New York statute providing that officers in political parties who assert their privilege against self-incrimination can be turned out of office. The Court held that it is a violation of the Fifth Amendment "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered." *Id.* at 805. As the trial court noted in this proceeding, there is nothing in the record that suggests Graves faced job sanctions or any other official recriminations had he asserted his constitutional privilege against self-incrimination.

In finding that Graves's statement was voluntary, the trial court noted the absence from the record of any suggestion that Graves faced suspension or, indeed, any disciplinary sanctions, had he elected not to speak with the investigators. In these circumstances it was not clear error for the trial court to find that Graves's statement to the investigators was voluntary.

II.

Graves also contends that the trial court erroneously excluded all evidence of the T-shirt that was the subject of the State's motion *in limine* . M.R. Evid. 403 provides that a trial court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." We review evidentiary rulings for clear error or abuse of discretion, and accord "wide discretion" to

the trial court's evaluation of the potential for unfair prejudice. *State v. Shuman*, 622 A.2d 716, 718 (Me. 1993). When the evidence in question is proffered by a defendant in a criminal proceeding, and it is the State that is arguing that admission of the evidence would unfairly prejudice the State's case, the defendant's right to confront and cross-examine the witnesses against him[5] significantly circumscribes the court's discretion to exclude the evidence.

The United States Supreme Court articulated this principle in *Davis v. Alaska*, 415 U.S. 308 (1974), by its holding that a state trial court had deprived a defendant of his constitutional right to confrontation

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[5]This right is set forth in the Sixth Amendment to the United States Constitution, guaranteeing the right of an accused in a criminal prosecution "to be confronted with the witnesses against him," as well as Article 1, Section 6 of the Maine Constitution, guaranteeing the right of the accused "[t]o be confronted by the witnesses against the accused."

when the defendant was not permitted to cross-examine a prosecution witness, critical to the identification of the defendant, as to the witness's probation status. *Id.* at 310-311, 318. The defendant's theory was that the witness's fear of probation revocation created a bias in the witness and that his evidence was not to be believed or at least carefully considered in that light. The State argued that the witness's probationary status stemmed from a juvenile conviction and asserted its interest in preserving the confidentiality of juvenile adjudications. *Id.* at 319. In reversing the conviction, the Court stressed "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," *id.* at 316-17, and ruled that "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the

sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318. Thus exclusion of the evidence was "constitutional error of the first magnitude [that] no amount of showing of want of prejudice would cure." *Id.* (citations omitted). This right assumes particular importance when the evidence consists of testimony of a witness who might be motivated by "malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.* at 317 n.4, (*quoting Greene v. McElroy,* 360 U.S. 474, 496 (1959)); *see also* Field & Murray, *Maine Evidence,* § 607.2 at 6-27 (3d ed. 1992) (noting that curtailment of a defendant's right to cross-examination on Rule 403 grounds may lead to reversal of the conviction); 3A Wigmore, *Evidence,* § 945 at 782 (Chadbourn rev. 1970) (defining bias as "*all* varieties of hostility or prejudice against the opponent" (emphasis added)); *but see State v.*

Larrabee, 377 A.2d 463, 467 (Me. 1977) (the right described in *Davis* does not guarantee admission in evidence of all material of an impeaching nature).

In this case, pursuant to the explicit pretrial instructions of the court, Graves asked the complaining witness during cross-examination whether she had "sold or been involved in the sale of any T-shirts that depict or show this incident," but did not attempt to impeach her directly when she responded to the inquiry in the negative. As an offer of proof, Graves presented Jerry Martin, who testified that he was related to the complaining witness and her family by marriage. He stated that the complaining witness's mother had approached him in July of 1991 outside a store in Boothbay Harbor to ask if he were interested in purchasing the T-shirt in question. Martin went to the home of the witness and her mother some time later to see the shirt and was

told by the witness that they were temporarily out of stock. He further testified that the witness eventually called him to advise him that his T-shirt had arrived, and he went to her home to pick it up. When he arrived, she handed him a T-shirt, made a comment about Graves's sexual characteristics as depicted in the drawing, and accepted the payment of twenty dollars for the T-shirt. Her mother handed him a receipt for the payment. Martin did not know who was actually producing the T-shirts.

Describing the T-shirt and the involvement of the complaining witness with its sale and distribution as "cumulative bias evidence," the court stated there was insufficient evidence offered by Graves to show that she was engaged in a large economic scheme to make a great deal of profit from the sale of the T-shirts. The court determined that it was "far more prejudicial than probative in the circumstances of this

case where there is plenty of other evidence that animosity exists" between the complaining witness and Graves. Thus, the trial court excluded any evidence concerning the T-shirt. The State argues this was proper because the complaining witness had already admitted her extreme dislike for Graves. It is clear, however, that the evidence of the complaining witness's involvement in the sale of the T-shirts could demonstrate a bias against Graves distinct from her dislike of him.

We conclude that evidence linking the complaining witness to the marketing and sale of the T-shirt depicting Graves and hostility toward him is functionally indistinguishable from the evidence improperly excluded in *Davis* . The pecuniary interest and motivation of a complaining witness is a proper subject for jury consideration. Because we cannot say beyond a reasonable doubt that the exclusion of this

evidence did not affect the verdict, the error is not harmless and we vacate the judgment. *See State v. Anaya*, 438 A.2d 892, 894 (Me. 1981)). Accordingly, we need not address the remaining issues raised by Graves in this appeal.

The entry is:

Judgment vacated. Remanded to the Superior Court for further proceedings consistent with the opinion herein.

All concurring.

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NOTICE: Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Maine 04112, of any typographical or other formal errors in this opinion.

APPENDIX B

STATE OF MAINE
KENNEBEC, SS. SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-92-30

STATE OF MAINE	)	ORAL ORDER (T.,Vol. II at
V.	)	431-32) EXCLUDING JERRY
DAREN L. GRAVES,	)	MARTIN'S PROPOSED
Defendant	)	TESTIMONY, ENTERED ON
	)	AUGUST 21, 1992

THE COURT: Okay. Well based on my review of the matter here, hearing the testimony today I think in fact I would regard this as cumulative bias evidence. That doesn't mean it can't come in. It's clearly cumulative, a lot of other evidence to show why there is dislike between Shani Orne and the Defendant.

I think this if admitted would be given significance all out of proportion to that real value in the matter because of the particular description and so forth. In my view, therefore, it's far more prejudicial than probative.

I also note the witness being offered repeatedly answered, volunteered far beyond the responses -- far beyond the questions asked, which could create some risk. There that's not the reason I am excluding it. I am excluding it because it's far more prejudicial than probative in the circumstances of this case where there is plenty of other evidence that animosity exists between the parties, between Shani Orne and the Defendant.

I don't see any sufficient evidence offered by this Defendant, by this witness sort of large economic scheme to make a great deal of profit off of this. That's not supported. If that -- you know, that's sort of -- if anything it's based on hearsay. I don't know who was actually making these T-shirts. It appeared someone else was making them, not the Ornes, based on what the testimony was.

So I am going to basically sustain the State's objection, exclude this testimony in this matter. For

housekeeping matters I believe that one of the T-shirts is already in the courtroom that was marked. So we'll take that. Thank you. Okay. This case will be in recess now until I get through with the other pending criminal matters.

APPENDIX C

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court

Law Docket No.
Ken-93-32
Decision No. 6812

STATE OF MAINE,
Plaintiff/Appellee

v.

DAREN L. GRAVES
Defendant/Appellant

ORDER

Upon motion of Appellee for reconsideration, it is ORDERED that the motion be, and it hereby is DENIED.

Date: March 31, 1994

For the Court

s/Caroline D. Glassman
Justice, Supreme Judicial Court

Dana, J., did not participate.

Supreme Court, U.S.
FILED
AUG 23 1994
OFFICE OF THE CLERK

(2)

No. 93-2065

In The

Supreme Court of the United States

October Term, 1994

STATE OF MAINE,

Petitioner,

v.

DAREN L. GRAVES,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court, State Of Maine

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The Supreme Judicial Court, State Of Maine

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, DAREN L. GRAVES, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, STATE OF MAINE.

OPINIONS BELOW

The Superior Court, State of Maine, entered a conviction on a jury verdict. The Maine Supreme Judicial Court reversed the conviction and remanded.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State of Maine petitioned for a Writ of Certiorari invoking the jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

The State of Maine has misstated or omitted facts bearing on the question of the issues that would properly be before the Court were certiorari granted. Pursuant to Supreme Court Rule 15.1 Respondent identifies below Petitioner's material errors and omissions.

The State of Maine in its Petition for Certiorari incorrectly claims that Respondent had the opportunity to ask the complaining witness[1] whether she sold or had been involved in the sale of a T-shirt[2], and further incorrectly claims that Respondent failed to avail himself of the opportunity to cross-examine about it. Because of these claimed failures, the State argues that the Maine Supreme Judicial Court erred by concluding that the Defendant's

---

[1] The State, throughout its brief, referred to the complaining witness by her first name alone. The Maine Supreme Judicial Court, in its decision, referred to Ms. Shani Orne as the complaining witness. Respondent adopts the usage employed by the Maine Supreme Judicial Court, which is clearly preferable in style and manner. This is especially true where first name references are used with respect only to women witnesses.

[2] Further reference to the marketing, distribution, and sale of the T-shirts shall be referred to hereinafter as "the enterprise."

Sixth Amendment right to confrontation of witnesses was infringed by the trial Court's refusal to allow bias evidence.

The central issue for which the State seeks review here is conditioned entirely upon the underlying factual validity of the State's claim that the Respondent, at trial, did not cross-examine the complaining witness in greater detail with respect to her participation in a commercial enterprise exploiting the notoriety and allegations of the case. The genesis and circumstances of the in limine orders preventing Respondent from fully cross-examining the witness who claimed Respondent raped her, and the Court's subsequent modification and extension of that ruling during the course of the trial is of critical import.

The State of Maine, knowing of the complaining witness's T-shirt enterprise, brought an in limine motion to exclude any evidence of her participation in it, and to prohibit introduction of or mention of the T-shirt in evidence. *(P.T. at 8.)*[3] The State represented during the course of later chamber's discussions, to the trial judge that the complaining witness did not participate in the T-shirt enterprise, and further represented that there was no evidence linking her to it. *(T., Vol 1 at 30.)* The Respondent represented that a witness would testify that the complaining witness was personally involved in promoting and selling the T-shirts. *(P.T. at 9).* The Court ruled that it would allow evidence relating to the T-shirt only if there was evidence tying financial interest in the shirt to

---

[3] References to pages in the two volume trial transcript (M.R.Crim.P. 39(b)) shall be in parenthesis as follows: (T.,Vol ___ at ___.) References to the in limine motion shall be in parenthesis as follows (P.T. Page ___.)

the complaining witness. At that point, counsel for the Defendant indicated the following:

MR. DARDIS: I will ask her on cross-examination whether or not she was involved in the sale of or the distribution of *the* T-shirt. [Emphasis added].

The Court responded:

THE COURT: Of *a* T-shirt, of *a* T-shirt. [Emphasis added].

The colloquy continued:

MR. DARDIS: I take it at that point the Court is indicating they don't want me to offer the T-shirt or show it at that point?

THE COURT: Obviously not. If she denies it, you have to have some other separate, independent knowledge, but she –

MR. DARDIS: She was involved in the sale.

THE COURT: If somebody testifies she was involved in the sale of it, it can come in too if she was involved in the sale.

MR. DARDIS: The witness will be testifying that she was directly involved. . . .

(P.T. at 9.)

Notwithstanding the Court's in limine ruling, *supra*, the State, on the following day of trial, again sought to exclude any evidence of the enterprise, and sought to prohibit cross-examination of the complaining witness about her bias and animus toward Respondent. The State claimed that to allow the question previously approved by the Court regarding the T-shirt would be prejudicial,

and that the mere asking of the question, "without an offer of proof of being able to link it to Shani is [to get] the benefit of the question and opening that inference before the jury and the State contends he will never be able to make that link of any financial gain to Shani, to the victim." *(T., Vol 1 at 30.)* The Respondent at that point offered a detailed offer of proof as to the involvement of the complaining witness with the T-shirt. Defense counsel stated:

> MR. DARDIS: Your Honor, the defense proposes to offer the evidence of a witness who is going to testify that he bought a T-shirt from Shani Orne at Shani Orne's house.
>
> That witness will also testify that Shani Orne discussed with him the fact that she shouldn't be selling the T-shirt because she was instructed not to.[4]
>
> Perhaps the appropriate method of handling this for the Court is to take voir dire of the testimony and then make a decision.
>
> *(T., Vol.1 at 30.)*

The Court responded to the prosecution's renewed motion and Defendant's renewed offer of proof as follows:

---

[4] Based on a statement from the prosecutor, the expected testimony of the complaining witness was that the prosecuting attorney had instructed her and her family to cease selling the T-shirts. Defense counsel fully expected to call the prosecuting attorney to testify, if the complaining witness denied that she had been instructed not to continue selling the T-shirts.

THE COURT: It seems to me as I understood what was going to be asked was ***a question*** which would appear in innocuous: Did you ever sell a T-shirt to so-and-so; yes or no?. [Emphasis added.]

T., Vol. 1 at 30.

During cross-examination of the complaining witness, defense counsel asked her,

MR. DARDIS: Have you sold, or have you been involved in the sale of any T-shirts that depict or show this incident?

ANSWER: No.

(T., Vol. 1 at 140-141.)

Unfortunately, the transcript does not show an objection made by the State as to the question and the Court's ruling thereon, nor the reprimand of defense counsel administered by the Court. However, from remarks made by the Court later in the trial, the objection and ruling are plainly evident. The following exchange occurred in chambers, detailing the objection and the Court's ruling:

MS. AMES: One other point while we're back here to the T-shirt again. My understanding of the way you wanted the T-shirt even brought up was whether she had sold a T-shirt.

THE COURT: Yep. The question was asked, "was there a T-shirt depicting this event?"

THE COURT: ***I sustained an objection.*** It had been asked. I thought it [i.e., the question] went beyond. [Emphasis added.]

MS. AMES: That just puts me between a rock and a hard place of objecting to something and highlighting it more".

THE COURT: "Yes."

(T., Vol. 1 at 151)

The prosecuting attorney, during the chambers discussion, asked for an order prohibiting defense counsel from any further inquiry into the T-shirt matter. The Court at that point made it clear how tightly it had controlled and would control cross-examination of the complaining witness:

THE COURT: Well, I guess what I am saying I want no further references – in my view your question went beyond what we agreed to. I talked about generic, I didn't tie it to the case. When I say something, I don't want something going beyond that to happen."

(T., Vol 1 at 153.)

This evidentiary ruling was identical in terms to the ruling made at sidebar following objection to the pre-approved question authorized by the Court.[5]

---

[5] As was explained to the Justices of the Maine Supreme Judicial Court at oral argument, no further questioning of the complaining witness was undertaken with respect to the T-shirt because the trial justice had severely reprimanded defense counsel for not asking an innocuous question as opposed to a context specific question. There was appreciation of the point by the Justices of the Court as there was considerable laughter and joking by the justices about the reprimand by the trial court.

Following the side bar conference and reprimand, defense counsel attempted no further questioning, upon the instruction of the Court, about the complaining witness's involvement in the enterprise. Defense counsel went on to other matters[6] expecting that upon presentation of the evidence of Jerry Martin, the defense would recall the complaining witness and cross-examine her fully as to her participation in the production, distribution, and sale of the T-shirts. Also, at that time, the defense would have fully explored the issue of bias, as well as the animus expressed on the face of the T-shirt.[7] Had cross-examination of the complaining witness been allowed, Respondent would have been able to show that her pecuniary activity and attitude belied her claim of rape when the parties in fact had a previous consensual relationship.

Notwithstanding the Court's prior ruling, "If somebody testifies she was involved in the sale of it, it can come in too, if she was involved in the sale," *(P.T. at 9.)* the Court ruled that the T-shirt issue was inadmissible. In so ruling, the defense was precluded from offering the testimony of Jerry Martin, which testimony, given the

---

[6] The State, in its Petition, noted the rapid shift in Defense Counsel's line of questioning, and suggested that this shift represented the failure to assert Respondent's Sixth Amendment rights. Appellate counsel for the State was not trial counsel, and was therefore completely unaware, from the ostensible record, that defense counsel was forced to abandon the line of questioning by order of the Court.

[7] The logos on the T-shirt stated, on the front, "Ain't Gettin' Off This Time," and, on the back, "They Finally Got the Big One."

Court's prior evidentiary rulings, was foundational to the cross-examination of the complaining witness.

ARGUMENT

I

THE MAINE SUPREME JUDICIAL COURT PROPERLY GRANTED RESPONDENT'S APPEAL BECAUSE HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION OF WITNESSES WAS DENIED.

The Maine Supreme Judicial Court properly granted Respondent's appeal on the basis that Respondent's Sixth Amendment right to confront witnesses was improperly denied at trial.

The fundamental point in this case is that the State sought and obtained a ruling at trial which precluded the Respondent from offering specific evidence of bias, and which precluded the Respondent from cross-examining the complaining witness about that bias. Aside from the possible application of Maine Rule of Evidence 403[8], the evidence of bias was relevant and admissible and consequently was the proper subject for extensive cross-examination.

---

[8] The Maine Rule of Evidence, 403, tracks Federal Rule of Evidence 403. Application of Rule 403 was not appropriate as the expected cross-examination was not merely cumulative of other bias evidence, nor would it have been repetitive or unduly harassing. See *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed 2d 513.

The Maine Supreme Judicial Court, following the principle of *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), concluded that the scope of discretion afforded a trial court, pursuant to Rule 403, was circumscribed by a defendant's Sixth Amendment right to confront the State's witnesses. The Maine Supreme Judicial Court correctly observed that defense counsel was subject to explicit pretrial instructions which severely restricted the scope of his cross-examination. A review of the multiple conferences between the Court and counsel regarding the nature of the cross-examination of the complaining witness demonstrates beyond dispute that the trial Court had defense counsel on an extremely short leash and would permit only one question regarding the T-shirt. The shortness of that leash is amply demonstrated by the fact that the Court would permit reference only to a generic T-shirt without any reference to the context or circumstances of the case. As far as the jury was concerned, the question dropped out of the clouds from nowhere and vaporized as quickly as it appeared. Respondent thus had no opportunity whatsoever for any development of the core issue of the parties' consensual relationship and of the complaining witness's motivation and credibility as manifested by her participation in the enterprise.

It is also significant that counsel for the Respondent deviated slightly from the Court-approved language by making the question slightly more context sensitive, asking "Have you sold, or have you been involved in the sale of any T-shirts that ***depict or show this incident***?" Significantly, the State objected, the objection was granted, and counsel for the defendant was severely reprimanded at

side bar, and ordered not to ask any further questions of the witness on that issue. The complete exclusion of any evidence of the T-shirt enterprise led the Maine Supreme Judicial Court to conclude that the resulting denial of Sixth Amendment witness confrontation rights was "functionally indistinguishable from the evidence improperly excluded in *Davis.*" *Graves v. State*, 638 A.2d 734 (Me. 1994), quoting *Davis v. Alaska, Id.*

The State places great stock in the fact that a follow up question (which as noted above was prohibited by the Court) to the court-approved question was not asked by defense counsel. Specifically, the State claims that defense counsel "never asked whether Shani had ever sold a T-shirt to Jerry Martin, and that consequently the failure to ask about the sale of a T-shirt to Jerry Martin constituted adequate opportunity for cross-examination." *State's Petition, at 28-30.* The State's argument defies the plain meaning of the question put to the complaining witness. She was asked, "Have you sold, or have you been involved in the sale of any T-shirts that depict or show this incident?" If the complaining witness had sold ***any*** T-shirts that concerned the incident at all, the only truthful answer the witness could have given was "Yes." Consequently, to ask a follow-up question, if allowed, "Did you sell a T-shirt to Jerry Martin?" was redundant, as the witness's earlier answer of "No" established that she did not sell a T-shirt to anyone at all. The State's entire argument on this point is fallacious and illogical, and is not supported by the facts of the case.

The State also claims that the admissibility of Jerry Martin's proposed testimony attacking the credibility of the complaining witness was an evidentiary matter to be

governed by the rules of evidence, hence was a State matter not rising to constitutional dimensions. This position completely ignores the procedural development of the case, and fails to recognize the multiple purposes of Jerry Martin's testimony. Because the State objected to the admissibility of the T-shirt evidence and the evidence that would have flowed therefrom, and because the State specifically represented to the trial court that there was no factual connection between the complaining witness and the T-shirts, the Court chose to severely restrict defendant's right to cross-examine the complaining witness about the T-shirt enterprise. The trial court's initial approach to the problem may have been correct insofar as it was intended to prevent the introduction of damaging evidence which might not have had any connection with the complaining witness. However, the trial court correctly observed at the time of its initial in limine ruling that if the defendant were to offer direct testimony of the complaining witness's connection or participation with the T-shirt, the evidence would be admissible. It follows that if the evidence was admissible for purposes of bias and impeachment in general, Respondent would have the right to cross-examine the complaining witness with that evidence. Thus, the testimony of Jerry Martin became foundational to the right of the Respondent to cross-examine the complaining witness about the T-shirt, for it was his testimony that linked her directly to it. The fact that Jerry Martin's testimony would accomplish other purposes concurrently with the evidentiary issue does not alter the fact that Jerry Martin's testimony went directly to establishing Respondent's constitutional right of witness confrontation.

The decision of the Maine Supreme Judicial Court in this case does not in any way extend the confrontation clause protection beyond that enunciated in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974), and the long succession of associated cases thereafter, such as *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). In *Davis*, the defendant sought to establish that a key prosecution witness was biased because the witness had a prior juvenile criminal conviction and therefore may have been over-zealous or overly eager to identify the defendants in that case. The claim of bias which the defense sought to develop was admissible in that case to establish a basis for an inference of undue pressure because of the State's witness's vulnerable status as a probationer. In *Davis*, the defense counsel was permitted a generic question, "Were you biased?" *Id.*, at 318, and was permitted to ask generic questions about the witness's contact with the police. However, when the witness responded with "No" answers, which on their face begged for follow-up questioning and impeachment, defense counsel was prohibited from doing so, because he was precluded from offering the witness's prior criminal record.

In the present case, defense counsel was placed on an even shorter leash than in *Davis*. The Court pre-authorized a single question, described by the Court itself as "innocuous". Defense counsel, in the face of a "No" answer by the complaining witness, was not permitted any follow-up at all. The entire subject was foreclosed. The violation of Respondent's Sixth Amendment rights was considerably more flagrant in this case than in *Davis*.

The State's argument claiming that Respondent had adequate opportunity to cross-examine the complaining witness is virtually identical to the reasoning of the Alaska Supreme Court's conclusion in *Davis v. Alaska, Id.*, at 314-315, that the cross-examination that defense counsel was permitted was adequate to develop the issue of bias for the jury. As this Court noted in *Davis*,

> While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. *Davis v. Alaska*, 415 U.S. 308 (1974) at 318.

In the present case, Respondent was unable to make any record whatsoever from which to argue issues of bias and animus. Just as in *Davis*, the straight-jacket in which the Court placed Respondent's counsel might well have led the jury to think that defense counsel was engaged in a speculative and baseless line of attack, asking questions that came from nowhere and led to nowhere. Such questions hardly create an effective record from which a case can adequately be argued to a jury.

The trial Court's most fundamental error in this case was its usurpation of the jury's function. Perhaps blinded by the zeal of the prosecution, the Court succumbed to the prosecution's argument and held that Respondent's right to cross-examine the complaining witness hinged on the credibility of the complaining witness herself. Specifically, the effect of the Court's evidentiary rulings made the defendant's ability to cross-examine turn exclusively on the truthfulness of the complaining witness's response to defense counsel's question about her participation in

the T-shirt scheme. A defendant's right to cross-examine his sole accuser cannot be made hostage to the accuser's own truthfulness.

It is for the jury, and the jury alone, to decide the credibility of the witnesses and the weight to be given to their evidence. Consequently, once the trial Court heard the voir dire testimony of Jerry Martin and heard that the complaining witness had handed him a T-shirt at her home, after informing him that a fresh supply of T-shirts had recently arrived and were stored at her residence, and that the complaining witness had accepted $20.00 from Jerry Martin for the shirt while making disparaging remarks to him about the Respondent and his genitalia, at that point the trial Court was compelled to admit the testimony of Jerry Martin and to permit Respondent to cross-examine. The Court interposed its opinion of the evidence in place of the jury's. The failure of the trial Court to allow the defendant effective cross-examination was "constitutional error of the first magnitude, and no amount of showing of want of prejudice could cure it". See *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 16 L.Ed.2d 314 (1968) and *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974). The Maine Supreme Judicial Court properly concluded that Respondent was denied effective cross-examination in violation of his Sixth Amendment rights and accordingly, the State's petition must be dismissed.

II

THE PLAIN ERROR TEST HAS NO APPLICATION WHEN FUNDAMENTAL CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED AT TRIAL.

The Petitioner, in its second Question, argues that "it was not given fair warning at the trial level that the defendant's Sixth Amendment constitutional rights were an issue and that because of that, the State did not fully present its case." The State's argument is groundless.

The record leaves no question but that Respondent struggled, from the very outset, to fully present his case by demonstrating to the jury the complaining witness's bias and prejudice. This case was presented to the jury by both the State and the Defense as a credibility case, and Respondent's failure to secure full and effective cross-examination of the complaining witness was fatal to a proper presentation of his defense. Indeed, it can be fairly said that the outcome of this case might very well have been different had the evidence, which the trial Court described as "highly prejudicial," been before the jury.

The State of Maine at every turn sought to frustrate Respondent's ability to obtain full cross-examination of the complaining witness. The State successfully persuaded the trial Court to limit defendant's cross-examination of the complaining witness to a single generic question from which there was no follow-up allowed. Precisely because the State was so successful in its strategy, the State had no reason to offer additional testimony that would have unravelled the very results it had so

aggressively pursued. Because the State's strategy precluded Respondent from obtaining key cross-examination, the State cannot now be heard to complain that its strategy unknowingly violated Respondent's Sixth Amendment right.

As the Maine Supreme Judicial Court aptly observed,

> "When the evidence in question is proffered by a defendant in a criminal proceeding, and it is the State that is arguing that admission of the evidence would unfairly prejudice the State's case, the defendant's right to confront and cross-examine the witnesses against him significantly circumscribes the Court's discretion to exclude the evidence." *State of Maine v. Daren L. Graves*, 638 A.2d 734, App. at 15.

This observation was hardly a novel statement of the law. *Davis v. Alaska, Id.*, and its successor cases, circumscribing the trial Court's authority to invoke Federal Evidence Rule 403, or its state equivalent, to prevent cross-examination of a key prosecution witness was well known. When the prosecution elected to pursue the course that it did, it knew, or should have known, that Respondent's constitutional rights were violated. The State cannot now be relieved from the results of its trial strategy by imploring this Court to utilize a lesser standard of review. The State was never surprised at all: rather, it was the architect and maker of its own woe.

The State's reliance on *United States v. Olano*, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) is misplaced. The State, in invoking *Olano*, suggests that since Respondent "forfeited" his constitutional rights by the failure to make a timely assertion before a tribunal having jurisdiction to

determine it, the defendant on appeal was subject to the plain error test, rather than the harmless error test of *Chapman v. California*, 386, 87 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). For all the reasons set forth in the first part of Respondent's brief, he did not forfeit his Sixth Amendment rights by failure to make a timely assertion of those rights. Respondent repeatedly and vigorously sought to introduce evidence of bias and prejudice on the part of the complaining witness and sought to offer impeachment evidence. The trial Court hobbled Respondent in that attempt. There was no forfeiture or waiver of the right of cross-examination; rather, it was incorrectly denied by a trial Court that at once characterized Respondent's evidence as highly emotional and prejudicial and at the same time, merely cumulative. Because there was no waiver or forfeiture of constitutional rights, the *Olano* argument is never reached and no consideration can be given to the plain error test as the appropriate standard of review in this case.[9]

Also, *Olano, Id.*, must be distinguished from the instant case, because in *Olano* the defendants did not object to the error, but, rather, expressly agreed to the

---

[9] The Maine Supreme Judicial Court stated in its opinion that because of the result it had reached based on this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), it was not necessary for the Court to consider any other issues raised by the defendant on appeal which included the issue of whether or not there was plain error in the case. In the event that this Court were to grant review and subsequently to reverse, the plain error issue should be remanded to the Maine Supreme Judicial Court for determination in accordance with Maine State Law.

impugned procedure. Even more significantly, the defendants were unable to show that the error was prejudicial and affected substantial rights.

In the present case, the error was substantially more than plain error. Unlike counsel's waiver of known rights in *Olano, Id.*, at 1775, counsel vigorously and repeatedly pressed Respondent's right to present impeachment evidence and to cross-examine the complaining witness on that evidence. The error here is constitutional in proportion and "deprived the defendant of the basic protection [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S.Ct. 310, 92 L.Ed.2d 463. Such error does not attract the plain error analysis of Fed. Rule Crim. Proc. 52. *Olano Id.* at 1778, but rather is subject to the harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1966).

The State invites this Court to treat the present case as "an opportunity to extend the plain error doctrine to constitutional issues which have not been raised in a timely manner at the *state* trial level, and where there is thus not an adequate record for application of the harmless error test." *State's Petition*, at 44. Again, for factual reasons, this case does not remotely resemble the State's characterization of it. The constitutional issue was adequately preserved by Respondent's continued insistence and attempt to assert the full panoply of his rights. Although Respondent did not utter a constitutional mantra, he certainly made it plain throughout the proceedings

what rights he was proposing to assert and what evidence he intended to offer. The trial Court cannot be said to have been misled or confused by the defendant's position. The record is completely adequate to demonstrate Respondent's repeated assertion of his rights, and consequently, this case clearly presents no opportunity to consider application of the plain error doctrine.

This Court should, instead, consider the factors enunciated in *Delaware v. Van Arsdall*, 475 U.S. 673, 10[illegible] S.Ct. 1431 (1986) to determine whether the error was harmless beyond a reasonable doubt. The Maine Supreme Judicial Court concluded that the error was not harmless, as the cross-examination excluded was critical impeachment testimony of Respondent's sole accuser, and the evidence was not merely cumulative, and there was additional corroborating evidence. This Court should recognize the satisfaction of the Van Arsdall criteria and adopt the conclusion that the trial error was not harmless error.

CONCLUSION

Respondent was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias" on the part of his accuser. As a result, he was unable to fully develop his case and have the jury pass upon the reliability and credibility of the complainant. The error deprived Respondent of his Sixth

Amendment constitutional rights and was not harmless. The State's Petition for Certiorari must be denied.

Dated: August 23, 1994

Respectfully submitted,

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(3)

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No. 93-2065

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF MAINE,
Petitioner

V.

DAREN L. GRAVES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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U.S. Const., amend. VI 5, 7, 11,12

U.S. Sup. Ct. Rule 15.1 1

M.R. Crim. P. 39(b) 3

M.R. Evid. 403 10

THE TWO QUESTIONS PRESENTED IN THE PETITION ARE PROPERLY BEFORE THIS COURT

Relying on United States Supreme Court Rule 15.1, Respondent claims in his Brief in Opposition that "[t]he State of Maine has misstated or omitted facts bearing on the question of the issues that would properly be before the Court were certiorari granted." Brief in Opp. at 2. Respondent then identifies two alleged errors in the petition:

> The State of Maine in its Petition for Certiorari [1] incorrectly claims that Respondent had the opportunity to ask the complaining witness whether she sold or had been involved in the sale of a T-shirt, and further [2] incorrectly claims that Respondent failed to avail himself of the opportunity to cross-examine about it.

Brief in Opp. at 2 (footnotes omitted).

It is Respondent himself, however, who has misrepresented the record. A look at the facts in this

case demonstrates that the two questions presented in the petition are properly before this Court.

Petitioner will first address Respondent's two allegations of error in the petition. As for the first allegation, pages 7-8 and 27-28 of the petition, quoting directly from the Trial Transcript, Volume I at 30-31, demonstrate that the Trial Court did allow Defense Counsel to cross-examine Shani Orne, the complaining witness, about the T-shirt as follows: "Did you ever sell a T-shirt to so and so; yes or no?" As for the second allegation, Defense Counsel below failed to avail himself of this specific opportunity, although still cross-examining Shani about the sale of the T-shirt:

> Q Have you sold or have you been involved in the sale of any T-shirts that depict or show this incident?
>
> A No.

Q You are absolutely certain of that?

A Yes.

Q Do you know who Jerry Martin is?

A Yes.

Q Who is Jerry Martin?

A He's married to my aunt.

(T., Vol. I at 140-41).[1] Defense Counsel never asked whether Shani had ever sold a T-shirt to Jerry Martin, but instead went off on the following tack:

Q Now during the period of time that you rented the house from Mr. Graves did you have any problem paying the rent?

A Yes.

(T., Vol. I at 141), quoted in Pet. at 28-29.

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[1]References to pages in the two-volume trial transcript (M.R. Crim. P. 39(b)) shall be in parentheses as follows: (T., Vol. ____ at ____).

Since the petition, as demonstrated by the above quotations from the Trial Transcript, is faithful to the record, Respondent's claim that the petition misrepresents the facts is nothing more than a red herring to divert this Court's attention from the real issue in this case - viz., whether the Maine Supreme Court's decision, requiring that a defendant be allowed to put on a witness to supposedly impeach[2]

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[2]As noted in the petition for certiorari, "because Defense Counsel never took advantage of the opportunity to ask Shani [Orne] as to whether she had ever sold a T-shirt to Jerry Martin, there was nothing to be impeached with Jerry Martin's proposed testimony that the sale of a T-shirt had occurred. Although Shani denied that she had ever 'been involved in the sale of any T-shirts that depict or show this incident' (T., Vol. I at 140), Jerry Martin's proposed testimony would not have impeached Shani's denial because the T-shirt did not 'depict or show this incident,' i.e., the rape, but instead caricatured Respondent." Pet. at 30-31 n.7. Hence, in addition to the fact that Jerry Martin's proffered testimony failed to show (as the Trial Court recognized - T., Vol. II at 432) that Shani had an economic incentive to fabricate a rape charge against Respondent, Jerry Martin's proffered testimony had

the credibility of a prosecution witness, constitutes an unwarranted extension of the sixth amendment Confrontation Clause.

Respondent also contends that "once the trial Court heard the voir dire testimony of Jerry Martin and heard that the complaining witness had handed him a T-shirt at her home, after informing him that a fresh supply of T-shirts had recently arrived and were stored at her residence, and that the complaining witness had accepted $20.00 from Jerry Martin for the shirt while making disparaging remarks to him about the Respondent and his genitalia, at that point the trial Court was compelled to admit the testimony of Jerry Martin and to permit Respondent to cross-examine." Brief in Opp. at 15 (emphasis added). However, Respondent's assertion

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no value for impeachment purposes.

that Shani Orne told Martin that "a fresh supply of T-shirts... were stored at her residence" is nowhere supported in the record. Although Martin testified on voir dire that Shani referred to a "supply" of T-shirts (T., Vol. II at 417-18), Martin saw only the one T-shirt that was sold to him, and there was no evidence that it was Shani or Linda Orne (Shani's mother) who had the supply of T-shirts or that they did anything more than provide Jerry Martin at no profit to themselves with a T-shirt they had obtained from someone else who did have the supply of T-shirts caricaturing Respondent. In fact, the T-shirts were not stored at Shani's residence.

Moreover, Martin's voir dire testimony 1) that he paid $20 for the T-shirt or 2) that the T-shirt cost $15 and he gave Shani and Linda Orne a $20 bill and toid them to keep the change (T., Vol. II at 419, 425) does not show that Shani and Linda were in the

business or enterprise of - or profiting from - selling T-shirts. Furthermore, Martin's testimony did not establish 1) that Shani was the manufacturer of the T-shirt, 2) that Shani created the message, design, or caricature on the T-shirt, or 3) that Shani or her mother kept any of the money from the sale of the T-shirt. Indeed, Martin's testimony could not establish any one of these three points because they simply were not true. As the Trial Court recognized, "I don't see any sufficient evidence offered by this Defendant, by this witness sort of large economic scheme to make a great deal of profit off of this.... I don't know who was actually making these T-shirts. It appeared someone else was making them, not the Ornes, based on what the testimony was." (T., Vol. II at 432). Hence, contrary to the assertion of Respondent, the Trial Court was not compelled by the sixth amendment Confrontation Clause to admit the

testimony of Jerry Martin, and properly excluded Martin's testimony on evidentiary grounds.

Another example of Respondent's misrepresentation of this case is that without any citation to or quotation from the Maine Supreme Judicial Court's decision in State v. Graves, 638 A.2d 734 (Me. 1994), Respondent claims that "[t]he Maine Supreme Judicial Court correctly observed that defense counsel was subject to explicit pretrial instructions which severely restricted the scope of his cross-examination." Brief in Opp. at 10. In fact, however, the Maine Supreme Judicial Court found no such thing. Nor did Respondent present this issue to the Maine Supreme Judicial Court, particularly as Respondent apparently acquiesced in the Trial Court's limitation on Respondent's cross-examination of Shani Orne, having the following conversation with the Trial Court:

THE COURT: It seems to me as I understood what was going to be asked was a question which would appear in innocuous: Did you ever sell a T-shirt to so and so; yes or no?.

MR. DARDIS: Essentially, Your Honor, that would be the line of questioning.

THE COURT: That's what I understood.

MR. DARDIS: We weren't going to subject -- I was not going to pull the T-shirt out.

THE COURT: Did you sell -- did you ever sale a T-shirt to so and so, right, something like that?

MR. DARDIS: Something along those lines, yes. Your Honor, I will not be going beyond did she sell a T-shirt to so and so or sell T-shirts in general without offering what the T-shirt indicates.

THE COURT: Any suggestion that says anything -- any suggestion it is related to the case, a T-shirt generic.

> MR. DARDIS: That is right. She can admit that or deny she was involved in that.
>
> THE COURT: Okay. As I indicated I will allow that question based on the offer of proof which we had yesterday and today. Okay. We'll take a brief break.

(T., Vol. I at 30-31).

Because of this acquiescence, Respondent framed the issue on appeal in terms of whether the Trial Court abused its discretion under M.R. Evid. 403 by excluding the proffered "impeachment" testimony of defense witness Jerry Martin, not in terms of whether Respondent's cross-examination of Shani Orne was unduly restricted by the Trial Court. And the Maine Supreme Court found constitutional error in the exclusion of Martin's testimony, not in the scope of Respondent's cross-examination of Shani Orne. The Maine Supreme Court in fact stated:

> Graves contends, *inter alia*, that the trial court erred by... refusing to admit evidence of the complaining witness's involvement in marketing and selling a T-shirt publicizing the case. Because we agree with Graves that the trial court improperly excluded evidence concerning the T-shirt, we vacate the judgment.

Pet., App. at 2-3 (emphasis added).

Since the exclusion of the proffered testimony of Jerry Martin (a witness for Respondent) has nothing to do with whether Respondent's sixth amendment right to confront and cross-examine Shani Orne was violated, the Trial Court's exclusion of Martin's testimony for evidentiary reasons raises no constitutional issue at all. This is particularly so where Martin's proffered testimony failed to show that Shani had any economic incentive or motive for fabricating or bringing her accusation of rape against Respondent.

The Maine Supreme Court's decision requiring the admission of Martin's testimony therefore constitutes an unwarranted extension of the sixth amendment Confrontation Clause beyond the legitimate sixth amendment concern for insuring an opportunity for effective cross-examination of prosecution or adverse witnesses. Petitioner thus asks that the decision of the Maine Supreme Judicial Court be summarily reversed by this Court.

Alternatively, because the Confrontation Clause was raised sua sponte by the Maine Supreme Court and discussed for the first time in the Maine Supreme Court's written decision, so that Petitioner had no opportunity to address the scope of the Confrontation Clause and no notice to develop a record at the trial level focused specifically on this issue, the petition should be granted to make it clear that the Maine Supreme Court should have applied

the plain error test discussed in United States v. Olano, 113 S.Ct. 1770 (1993), not the harmless error test of Chapman v. California, 386 U.S. 18 (1967).

Respectfully submitted,

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